

1
2
3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 BECKY A. CHRISTEN,)
7 Plaintiff,) No. CV-11-297-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 BEFORE THE COURT are cross-motions for summary judgment. ECF
14 No. 13, 16. Attorney Maureen J. Rosette represents Plaintiff.
15 Special Assistant United States Attorney Jessica Milano represents
16 the Commissioner of Social Security (Defendant). The parties have
17 consented to proceed before a magistrate judge. ECF No. 8. On
18 November 5, 2012, plaintiff filed a reply. ECF No. 18. After
19 reviewing the administrative record and the briefs filed by the
20 parties, the court **grants** Defendant's Motion for Summary Judgment,
21 ECF No. 16.

22 **JURISDICTION**

23 On October 17, 2008, plaintiff protectively applied for
24 supplemental security income (SSI) alleging onset date as of
25 October 1, 2008 (Tr. 120-126, 130). The application was denied
26 initially and on reconsideration (Tr. 85-88, 92-93). Christen
27 alleged disability due to back problems, neck pain, and mental
28

1 problems (Tr. 135).

2 Administrative Law Judge (ALJ) James W. Sherry held a hearing
3 November 20, 2009. Plaintiff, represented by counsel, and a
4 vocational expert testified (Tr. 35-82). On January 11, 2010, the
5 ALJ issued an unfavorable decision (Tr. 17-28). The Appeals
6 Council denied review June 22, 2011 (Tr. 1-3), making the ALJ's
7 decision the final decision of the Commissioner appealable to the
8 district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed
9 this action for judicial review August 9, 2011. ECF Nos. 1, 4.

10 **STATEMENT OF FACTS**

11 The facts have been presented in the administrative hearing
12 transcript, the ALJ's decision, and the briefs of the parties.
13 They are only briefly summarized here.

14 Plaintiff was 49 years old when she applied for benefits and
15 51 at the hearing (Tr. 27, 38). Christen graduated from high
16 school. She has worked as a security guard/gate tender, and last
17 worked in May 2002 (Tr. 43, 45, 135). She is single and lives with
18 her nineteen year old son (Tr. 42-43). She broke her right arm in
19 August 2009 (Tr. 44). Christen testified she cannot work due to
20 low back pain that mostly radiates into the right leg; constant
21 right arm swelling; depression and concentration problems (Tr. 48,
22 50-52). She can sit for 30 minutes, stand for 15, and walk two
23 blocks. She falls a lot (Tr. 56, 58). In an eight hour day she
24 could sit for four hours, and stand and walk less than two (Tr.
25 63). When Christen had medical insurance she took prescribed
26 antidepressants and thought they helped (Tr. 65). Christen takes
27 methadone but it does not make her tired (Tr. 38, 59).

28 ///

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the Act) defines disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which compares plaintiff's impairment with a number of listed

1 impairments acknowledged by the Commissioner to be so severe as to
2 preclude substantial gainful activity. 20 C.F.R. §§
3 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P
4 App. 1. If the impairment meets or equals one of the listed
5 impairments, plaintiff is conclusively presumed to be disabled.
6 If the impairment is not one conclusively presumed to be
7 disabling, the evaluation proceeds to the fourth step, which
8 determines whether the impairment prevents plaintiff from
9 performing work which was performed in the past. If a plaintiff is
10 able to perform previous work, that Plaintiff is deemed not
11 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
12 this step, plaintiff's residual functional capacity (RFC)
13 assessment is considered. If plaintiff cannot perform this work,
14 the fifth and final step in the process determines whether
15 plaintiff is able to perform other work in the national economy in
16 view of plaintiff's residual functional capacity, age, education
17 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
18 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

19 The initial burden of proof rests upon plaintiff to establish
20 a *prima facie* case of entitlement to disability benefits.
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
22 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
23 met once plaintiff establishes that a physical or mental
24 impairment prevents the performance of previous work. The burden
25 then shifts, at step five, to the Commissioner to show that (1)
26 plaintiff can perform other substantial gainful activity and (2) a
27 "significant number of jobs exist in the national economy" which
28 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th

1 Cir. 1984).

2 **STANDARD OF REVIEW**

3 Congress has provided a limited scope of judicial review of a
4 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
5 the Commissioner's decision, made through an ALJ, when the
6 determination is not based on legal error and is supported by
7 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
8 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
9 "The [Commissioner's] determination that a plaintiff is not
10 disabled will be upheld if the findings of fact are supported by
11 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
12 Cir. 1983)(citing 42 U.S.C. § 405(g)).

13 **ALJ'S FINDINGS**

14 At step one, the ALJ found plaintiff did not engage in
15 substantial gainful activity after onset in October of 2008 (Tr.
16 19). At steps two and three, he found Christen suffers from lumbar
17 degenerative disc disease (DDD), history of right arm fracture,
18 major depressive disorder (recurrent, moderate), opioid dependence
19 in remission and history of fibromyalgia, impairments that are
20 severe but do not meet or medically equal a Listed impairment (Tr.
21 19-20). The ALJ found Christen's allegations regarding her
22 limitations were not entirely credible (Tr. 23). ALJ Sherry
23 assessed an RFC for a range of light work (Tr. 22). At step four,
24 relying on a vocational expert, the ALJ found Christen is unable
25 to perform any past relevant work (Tr. 26). At step five, again
26 relying on the VE, the ALJ found Christen can perform other jobs
27 such as small products assembler and hand packer/packing line
28 worker (Tr. 27). The ALJ found plaintiff has not been disabled as

1 defined by the Social Security Act at any time after she filed her
2 application (Tr. 28).

3 ISSUES

4 Plaintiff alleges the ALJ erred when he weighed the opinions
5 of Bailey, Bingham, and Bichler, and when he assessed Christen's
6 credibility. ECF No. 14 at 11-16. The Commissioner answers that
7 the ALJ's reasoning is supported by the record and free of legal
8 error. He asks the Court to affirm. ECF No. 17 at 18.

9 DISCUSSION

10 A. Standards for weighing opinion evidence

11 In social security proceedings, the claimant must prove the
12 existence of a physical or mental impairment by providing medical
13 evidence consisting of signs, symptoms, and laboratory findings;
14 the claimant's own statement of symptoms alone will not suffice.
15 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
16 on the basis of a medically determinable impairment which can be
17 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
18 medical evidence of an underlying impairment has been shown,
19 medical findings are not required to support the alleged severity
20 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9th Cir.
21 1991).

22 A treating physician's opinion is given special weight
23 because of familiarity with the claimant and the claimant's
24 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9th Cir.
25 1989). However, the treating physician's opinion is not
26 "necessarily conclusive as to either a physical condition or the
27 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
28 751(9th Cir. 1989)(citations omitted). More weight is given to a

1 treating physician than an examining physician. *Lester v. Chater*,
2 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
3 given to the opinions of treating and examining physicians than to
4 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
5 (9th Cir. 2004). If the treating or examining physician's opinions
6 are not contradicted, they can be rejected only with clear and
7 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
8 ALJ may reject an opinion if he states specific, legitimate
9 reasons that are supported by substantial evidence. See *Flaten v.*
10 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
11 1995).

12 In addition to the testimony of a nonexamining medical
13 advisor, the ALJ must have other evidence to support a decision to
14 reject the opinion of a treating physician, such as laboratory
15 test results, contrary reports from examining physicians, and
16 testimony from the claimant that was inconsistent with the
17 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,
18 751-752 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-1043 (9th
19 Cir. 1995).

20 **B. Psychologist Bailey**

21 Agency psychologist James Bailey, Ph.D., reviewed the record.
22 On January 26, 2009, he opined Christen is able to understand and
23 remember short, simple instructions; she may require more time
24 with detailed instructions but is otherwise capable. He opined she
25 can carry out short and simple instructions with limited social
26 interaction and may require more time with detailed instructions.
27 She is capable of making simple work-related decisions. He opined
28 Christen can maintain appropriate behavior and cleanliness and

1 "interact with co-workers/ask questions at a limited, superficial
2 capacity" (Tr. 232). Last, he opined Christen is able to adapt to
3 changes, use public transportation and take normal workplace
4 precautions. *Id.*

5 Plaintiff alleges the ALJ should have relied on the checked
6 boxes on a standard form rather than Dr. Bailey's narrative when
7 he assessed her residual functional capacity. ECF No. 14 at 12-13.
8 At the hearing the ALJ pointed out that Dr. Bailey's *narrative* is
9 the assessed RFC, not the worksheet, as plaintiff alleges (Tr.
10 80).

11 ALJ Sherry is correct. Citing *Israel v. Astrue*¹, the
12 Commissioner accurately points out that the Ninth Circuit recently
13 rejected this argument². ECF No. 17 at 18-19.

14 Plaintiff alleges the assessed RFC also failed to include
15 some of Dr. Bailey's assessed limitations: namely, that Christen
16 may require more time to understand, remember and carry out
17 detailed instructions, and is able to interact with/ask questions
18 of co-workers in a limited, superficial capacity. ECF No. 14 at
19 13. The Commissioner responds that the assessed RFC adequately
20 captures Christen's mental limitations. ECF No. 17 at 20.

21 The Commissioner is correct. An "ALJ's assessment of a
22 claimant adequately captures restrictions related to

23
24 ¹Case No. 11-35794, 2012 WL 4845578, at *2-3 (9th Cir. Oct.
12, 2012)(Slip op.).

25 ²"[Israel] cites [no] authority that requires the ALJ to
26 separately weigh and consider each checked box in Section I of
27 the MRFCA." *Isreal v. Astrue*, Slip. Op. at *3. "[I]t is the
28 narrative written by the psychiatrist or psychologist in section
III ... that adjudicators are to use as the assessment of RFC."
Israel, Slip Op. at *4, n. 1, citing POMS DI 25020.010B.1.

1 concentration, persistence or pace where the assessment is
2 consistent with restrictions identified in the medical testimony."
3 *Stubbs-Danielson v. Astrue*, 539 F.3d 1169 (9th Cir. 2008)(internal
4 citations omitted). This is significant because the ability to
5 carry out detailed instructions is a measure of "sustained
6 concentration and persistence" (Tr. 230 at I.B.).

7 Here the ALJ relied on restrictions identified in the medical
8 testimony of Dr. Bailey when making the RFC assessment. Dr. Bailey
9 "checked the box" indicating a moderate limitation in the ability
10 to maintain attention and concentration for extended periods (Tr.
11 230). In his RFC assessment, Dr. Bailey opined claimant is

12 able to remember short, simple directions; may require
13 more time with detailed instructions but is otherwise
capable.

14 Able to carry out short and simple instructions with
15 limited social interaction; may require more time with
detailed instructions. Capable of making simple
work-related decisions.

16 Able to maintain appropriate behavior and cleanliness
17 and interact with co-workers/ask questions at a limited,
superficial capacity.

18 Able to adapt to changes, use public transport, and take
19 normal work-place precautions.

20 (Tr. 232).

21 The ALJ's restrictions related to concentration, persistence
22 or pace are consistent with restrictions identified in the medical
23 testimony. Accordingly, the RFC adequately captures these
24 limitations. See *Stubbs-Danielson*, 539 F.3d at 1174. With respect
25 to Dr. Bailey's opinion that interacting with and asking questions
26 of coworkers should be on a limited, superficial basis, the ALJ's
27 hypothetical was limited to occasional superficial contact with
28 the public, coworkers and supervisors (Tr. 22). This limitation is

1 also consistent with Dr. Bailey's testimony and with the record as
2 a whole. Examining psychologist Nathan Henry, Psy.D., diagnosed
3 major depressive disorder (recurrent, moderate) and opioid
4 dependence. He assessed a GAF of 51, indicative of moderate
5 symptoms or difficulty. Dr. Henry cautioned that diagnosis and
6 prognosis are both complicated by opioid dependence. He opined if
7 Christen's depressive symptoms were brought under better control
8 and she continues to refrain from abusing opiates or other
9 substances, "she would be expected to be able to return to work."
10 (Tr. 244).

11 As the ALJ points out, Christen has had virtually no
12 treatment for depression during the relevant time frame,
13 significantly undercutting allegations of disabling depression
14 (Tr. 23-25). The ALJ properly weighed the evidence of mental
15 limitations.

16 **C. Bingaman, incorporated by Backlund and Platter**

17 Plaintiff alleges the ALJ should not have relied on Tony
18 Bingaman's opinion because he was a "non-treating, non-examining,
19 single decision maker," and is not a medical doctor. ECF No. 14 at
20 15-16.

21 Mr. Bingaman's RFC was approved by Drs. William Backlund and
22 Platter, who are both medical doctors (Tr. 239-40, 247). Citing
23 *Rustad v. Astrue*, 2012 WL 314908 at *8 (E.D. Wash. Aug. 1,
24 2012)(slip copy), the Commissioner responds that the ALJ properly
25 based the physical RFC determination on Drs. Backlund and
26 Platter's opinions which incorporated by reference Mr. Bingaman's
27 assessment. ECF No. 17 at 21. The Commissioner is correct.

28 The Commissioner adds that because the opinions of Backlund

1 and Platter were "well supported by the record as a whole," the
2 ALJ was entitled to credit them. ECF No. 17 at 21.

3 The Commissioner is correct. The ALJ properly weighed these
4 opinions.

5 **D. Bichler's opinion**

6 Plaintiff alleges the ALJ failed to properly credit the
7 opinion of Karen Bichler, ARNP. ECF No. 14 at 14-16. The
8 Commissioner answers that the ALJ properly discounted the opinion
9 because it was given for GAU purposes, it was not well supported
10 by clinical or laboratory findings, and it lacked support in the
11 rest of the record. ECF No. 17 at 22-23, citing Tr. 26.

12 The Commissioner is correct.

13 Nearly a year after onset, on November 5, 2009, Ms. Bichler
14 opined Christen is limited to sedentary work. She noted Christen
15 had not worked in eight years and has been going to the methadone
16 clinic since October 2008. She had been discharged from CHAS
17 Clinic for non-compliance and drug addiction. Christen has a
18 surgical consultation regarding a possible hernia in five days.
19 Ms. Bichler recommended an MRI of the lumbar spine, as well as a
20 substance abuse evaluation and treatment. She opined that after
21 receiving recommended treatment, Christen's ability to work should
22 be re-evaluated in six months (Tr. 259-60).

23 The ALJ properly weighed this opinion. Despite assessing an
24 RFC limited to sedentary work, the results of Bichler's own
25 examination show claimant's results were all normal, with the
26 exception of forward bending (Tr. 259). An ALJ need not accept the
27 opinions of a doctor if that opinion is brief, conclusory, and
28 inadequately supported by clinical findings. *Bayliss v. Barnhart*,

1 427 F.3d 1211, 1216 (9th Cir. 2005).

2 Ms. Bichler assessed limitations based on Christen's reported
3 hernia, high blood pressure and remote history of a fractured tail
4 bone. In November 2009 Ms. Bichler does not mention that Christen
5 broke her right wrist and underwent surgery two months earlier.

6 Plaintiff alleges the ALJ's hypothetical should have included
7 the limitations of reduced strength and reduced range of motion in
8 the right (dominant) arm, following the broken wrist. ECF No. 18
9 at 3.

10 Christen is incorrect.

11 Christen did not undergo follow up treatment for this
12 condition after surgery and post operative examination. The ALJ
13 was not required to include any wrist-related limitations because
14 they do not meet the 12 month durational requirement, nor are they
15 severe based on Ms. Bichler's examination.

16 **E. Credibility**

17 Credibility determinations bear on evaluations of medical
18 evidence when an ALJ is presented with conflicting medical
19 opinions or inconsistency between a claimant's subjective
20 complaints and diagnosed condition. *See Webb v. Barnhart*, 433 F.3d
21 683, 688 (9th Cir. 2005). The ALJ gave clear and convincing
22 reasons for his adverse credibility determination. When he
23 assessed credibility the ALJ considered, in part, plaintiff's
24 failure to seek treatment, lack of compliance with treatment and
25 inconsistent statements (Tr. 23-24).

26 The ALJ notes Christen failed to seek medical treatment after
27 she was seen three times in August 2001 (for abscesses related to
28 "skin popping and intravenous drug use") until September 2007,

1 when she ran out of methadone early due to taking more than
2 prescribed. She sought no treatment from February 13, 2008 until
3 September 2, 2008, when she was treated for bronchitis and a staph
4 infection (Tr. 23-24, 205, 272, 275-76, 278). She failed to comply
5 with the terms of her treatment plan at CHAS clinic and was
6 terminated in February 2008 Tr. 188). Christen gave conflicting
7 reasons for failing to comply with outpatient substance abuse
8 treatment. She told Dr. Henry she was waiting to take the classes
9 with her brother. On other occasions Christen said CHAS would not
10 schedule her an appointment, and on another, she said she had to
11 go to Atlanta to pick up her grandson. With respect to
12 credibility, the ALJ also observes in August 2009 Christen told
13 Martin Janout, M.D., that she has to mow the lawn frequently. She
14 is described as "unemployed but quite active" (Tr. 24, 191, 194,
15 200, 242, 256).

16 These are clear and convincing reasons supported by
17 substantial evidence. *Thomas v. Barnhart*, 278 F.3d 947, 958-959
18 (9th Cir. 2002)(inconsistent statements diminish credibility);
19 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)(unexplained
20 failure to follow medical treatment diminishes credibility).

21 **F. Grids**

22 Plaintiff alleges if the ALJ had properly credited Ms.
23 Bichler's opinion, Christen would have been found disabled under
24 Grid rule 201.12. ECF No. 14 at 16. As noted above, the ALJ
25 properly weighed the medical and other evidence. Accordingly, the
26 Grids do not apply.

27 It is the role of the trier of fact to resolve conflicts in
28 evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The ALJ

1 acted in accordance with his responsibility to determine the
2 credibility of the medical evidence, and he gave specific,
3 legitimate reasons for discrediting particular opinions. See
4 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992);
5 *Magallanes v. Bowen*, 881 F.2d 747, 751-752 (9th Cir. 1989).

6 Although the evidence may support more than one rational
7 interpretation, the Court may not substitute its judgment for that
8 of the Commissioner where, as here, proper legal standards were
9 applied in weighing the evidence and making the decision. See
10 *Brawner*, 839 F.2d at 433; *Sprague*, 812 F.2d at 1229-1230.

11 The ALJ properly weighed the medical evidence of
12 psychological limitations and plaintiff's credibility. He came to
13 a reasonable conclusion based on the evidence in the record, and
14 that ends the court's inquiry on appeal. *Bayliss v. Barnhart*, 427
15 F.3d 1211, 1214 n. 1 (9th Cir. 2005) ("If the record would support
16 more than one rational interpretation, we defer to the ALJ's
17 decision.").

18 CONCLUSION

19 Having reviewed the record and the ALJ's conclusions, this
20 court finds that the ALJ's decision is free of legal error and
21 supported by substantial evidence.

22 IT IS ORDERED:

23 1. Defendant's Motion for Summary Judgment, **ECF No. 16**, is
24 **GRANTED**.

25 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13**, is
26 **DENIED**.

27 The District Court Executive is directed to file this Order,
28 provide copies to counsel for the parties, enter judgment in favor

1 of Defendant, and **CLOSE** the file.

2 DATED this 29th day of January, 2013.

3
4 s/ James P. Hutton

JAMES P. HUTTON

5 UNITED STATES MAGISTRATE JUDGE
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28